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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 76.51  
of the Commission's Rules  
to Include Baytown, Texas,  
in the Houston, Texas Market

RM -

*PRM*

TO: Chief, Mass Media Bureau

PETITION FOR RULE MAKING

PRAY, INC. (Station KRTW[TV])

Donald E. Ward  
1201 Pennsylvania Avenue, N.W.  
Fourth Floor  
Washington, D. C. 20004  
(202) 626-6290

Its Attorney

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## SUMMARY

Station KRTW(TV), licensed to Baytown (24 miles east of Houston), seeks amendment of Section 76.51 of the Rules to include Baytown, and potentially other nearby communities to which stations have been authorized, in the Houston market designation.

KRTW shows that (1) Baytown, like Houston, is located in Harris County; (2) KRTW serves Houston with a City Grade signal; (3) 98% of the Houston 35-mile zone lies within KRTW's Grade B contour; (4) virtually all of the stations licensed to the several communities in the Houston ADI (Galveston, Rosenberg, Alvin, Katy, and Conroe) serve substantial areas in common, and of necessity are competing with each other for viewers and advertising; and (5) the interrelationship of the 1992 Cable Act and the 1976 Copyright Act place newer television stations such as KRTW at a severe competitive disadvantage vis-a-vis established stations by denying newcomers access to cable systems beyond their 35-mile zones, or alternatively compelling them to pay for access to systems which their established competitors receive freely.

Thus, the realities of the Houston television market should be recognized through the requested hyphenation of Baytown and the other communities in the market to which stations have been authorized.

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PETITION FOR RULE MAKING

Pray, Inc., licensee of Station KRTW(TV), Baytown, Texas (hereinafter "KRTW"), pursuant to Section 4 of the Cable Television Consumer and Competition Act of 1992 (47 U.S.C. Sec. 614), respectfully requests that the Commission promptly institute rule making to amend Section 76.51 of its Rules, to include Baytown, Texas, as part of the Houston, Texas, market.<sup>1</sup> In support thereof, it states as follows:

I. Background

Station KRTW(TV) operates on Channel 57, and is licensed to Baytown, Texas. Baytown is located on the northwest coast of Galveston Bay, approximately 24 miles east of Houston (center-to-center), and is the third largest city in Harris County; Houston,

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<sup>1</sup> Consistent with its recently released notices of proposed rule making in Docket Nos. 93-290 and 93-291, involving the New York and Boston television markets, respectively, KRTW encourages the Commission to consider, as well, amending Section 76.51 to include the communities of Galveston, Alvin, Rosenberg, Katy, and Conroe, Texas, each of which has been authorized one or more television stations.

of course, is the largest, and Pasadena (which lies between Houston and Baytown) is the second largest.

Station KRTW(TV) commenced operation in May 1988 from a transmitter site east of Galveston Bay, from which it provided a predicted Grade B contour over most of Houston. In August 1990, its application to move to a new transmitter site south of Houston, from which it would place a city grade contour over virtually all of Houston, was granted, and those facilities<sup>2</sup> became operational in January 1992.

## II. The Houston Television Market

Section 76.51 of the Commission's Rules identifies the top 100 television markets, and the designated communities within those markets. Houston is designated in that rule as the fifteenth television market.<sup>3</sup> Neither Baytown, nor any of the other cities within the Houston ADI to which television stations have been authorized, is currently designated with Houston on a hyphenated basis.

The following commercial television stations are authorized to communities within the Houston Area of Dominant Influence

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<sup>2</sup> KRTW(TV) operates with maximum ERP of 5,000 kilowatts, with an antenna height above average terrain of 585 meters. A copy of its current coverage map is attached as Exhibit A hereto.

<sup>3</sup> Based on the most recent Arbitron data, Houston is ranked the 11th television market.

(ADI)<sup>4</sup>:

KPRC-TV	Houston	Channel 2	NBC
KHOU-TV	Houston	Channel 11	CBS
KTRK-TV	Houston	Channel 13	ABC
KTXH-TV	Houston	Channel 20	IND
KRIV-TV	Houston	Channel 26	FOX
KHTV-TV	Houston	Channel 39	IND
KXLN-TV	Rosenberg	Channel 45	IND (Univision)
KTMD-TV	Galveston	Channel 48	IND (Telemundo)
KTFH-TV	Conroe	Channel 49	IND (Galavision)
KNWS-TV	Katy	Channel 51	IND
KRTW-TV	Baytown	Channel 57	IND
KZJL-TV	Houston	Channel 61	IND
KHSH-TV	Alvin	Channel 67	IND (Home Shpg Net.)

The population of each of these communities (1990 U.S. Census) is:

Houston	1,630,553
Baytown	63,850
Galveston	59,070
Conroe	27,610
Rosenberg	20,183
Alvin	19,220
Katy	8,005

Exhibit B hereto is a contour map reflecting KRTW's current city-grade and Grade A and Grade B contours, on which has been superimposed the 35-mile zones of Baytown, Houston, Galveston, Rosenberg, Alvin, and Katy. As can be seen, the reference points for Houston, Alvin and Galveston are within thirty-five miles of Baytown's reference point, and those of Baytown, Alvin, Katy, and Rosenberg are within thirty-five miles of Houston's reference point. Rosenberg's 35-mile zone includes Houston, Katy, and Alvin; Alvin's 35-mile zone includes Houston, Baytown, Rosenberg,

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<sup>4</sup> Station KNWS (Katy) is not in operation; Station KZJL (Houston) commenced operation in November 1993.

and Galveston. Galveston and Conroe lie just outside the Houston 35-mile zone, but their respective 35-mile zones each include portions of Houston.

Exhibit C hereto is an enlarged portion of Map 95 taken from Warren Publishing's 1993 Cable and Station Coverage Atlas depicting Grade B contours of each of the stations in the market; as it illustrates, all of the stations authorized to communities in the Houston ADI (with the possible exception of the Conroe station) serve substantial areas in common.

### III. Inclusion of Baytown in the Houston Television Market Is Consistent With Commission Precedent

The Commission has consistently evaluated requests to amend Section 76.51 to add communities to the markets specified therein under the following factors:

"(1) The distance between the existing designated communities and the community proposed to be added to the designation;

"(2) Whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area;

"(3) The presence of a clear showing of a particularized need by the station requesting the change of market designation; and

"(4) An indication of benefit to the public from the proposed change."

See, e.g., Major Television Markets (Fresno-Visalia, California), 57 RR 2d 1122 (1985); Amendment of Section 76.51 (Clearwater-Tampa-St. Petersburg), 8 FCC Rcd 5069 (1993).

A. Baytown's Proximity to Houston

As noted above, Baytown is located just 24 miles east (center-to-center) of Houston, and, like Houston, is located in Harris County. Baytown lies within the city-grade contours of each of the Houston commercial stations, as well as the Rosenberg, Galveston, and Alvin stations (see TV Factbook), and Houston, Galveston, Rosenberg, and Alvin are all within the city-grade contour of KRTW. Baytown's distance from Houston is only two-thirds the distance between Fresno and Visalia, which in that case was found to be no impediment to hyphenation -- the Commission noting that the distance involved there was "considerably less" than that in the rejected hyphenation of Florence and Huntsville, Alabama, in Television Muscle Shoals, 48 RR 2d 1191 (1980), recon. denied 87 FCC 2d 507 (1981);<sup>5</sup> and in the approved hyphenation in Orlando-Daytona Beach-Melbourne, and

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<sup>5</sup> Florence, Alabama -- the licensed community of Muscle Shoals -- is approximately seventy-five miles from Huntsville, the television market with which it sought hyphenation.



Cocoa, Florida, 51 RR 2d 685 (1985).<sup>6</sup>

B. KRTW's Grade B Contour Encompasses  
Virtually All of the Houston 35-Mile Zone

As can be seen from Exhibit B, a small crescent of the Houston 35-mile zone extends beyond KRTW's 35-mile zone. That crescent, three miles wide at its maximum width and approximately 40 miles long, includes an area of approximately 60 square miles, which appears to contain no significant communities.<sup>7</sup> As the total area of a 35-mile zone is 3848 square miles, that portion of the Houston 35-mile zone lying beyond KRTW's Grade B contour represents less than 2% of the total area of the Houston 35-mile zone.<sup>8</sup>

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<sup>6</sup> Melbourne is approximately seventy-five miles from Daytona Beach, and approximately 55 miles from Orlando.

In this connection, it is to be noted that the Commission's Report and Order in Docket 92-259, at ¶50, amended Section 76.51 to (1) add Chillicothe, Ohio, to the Columbus market; (2) add New London, Connecticut, to the Hartford-New Haven-New Britain-Waterbury market; and (3) add Rome, Georgia, to the Atlanta market; 8 FCC Rcd 2965, at 2978 (1993). Chillicothe and New London are each approximately 40 miles from the city(ies) with which they are newly hyphenated, and Rome is some 70 miles from Atlanta.

<sup>7</sup> By contrast, the Baytown 35-mile zone extends beyond KRTW's Grade B contour in a crescent area six miles wide (at its maximum) and fifty-two miles long.

<sup>8</sup> Somewhat larger crescent-shaped areas of the 35-mile zones of Rosenberg and Katy fall beyond the KRTW Grade B Contour. With the exception of Hempstead, Bellville, and Eagle Lake, these areas appear not to contain significant communities. The Alvin 35-mile zone and most of the Galveston zone are within the KRTW City-Grade contour; no portion of these zones falls outside of KRTW's Grade B contour.

In view of the foregoing, it may be safely concluded that the requested inclusion of Baytown in the Houston television market on a hyphenated basis -- and the inclusion of Galveston, Rosengerg, Alvin, and Katy as well -- would not significantly extend KRTW's mandatory carriage rights beyond its Grade B contour.<sup>9</sup>

### C. KRTW's Need For Relief

As noted above, KRTW commenced operations in 1988, at a time when cable television was enjoying the fruits of its recent deregulation, and after the Commission's 1972 and 1986 "must-carry" rules had been judicially nullified.<sup>10</sup> Not only was KRTW competing for audience over-the-air with well-established Houston stations; it was foreclosed from competing for audience with those stations in cable homes. Most of the Houston stations continued to be carried by cable systems throughout the Houston ADI despite the elimination of the earlier "must-carry"

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<sup>9</sup> It should also be noted that the four factors under which the Commission evaluates hyphenation requests predate the 1992 Cable Act. That Act, by according to cable systems the right to reject carriage of otherwise mandatory signals on the ground of inadequate signal strength, has significantly addressed the concern which was the basis for this factor -- i.e., that by extending the area of mandatory carriage beyond a station's Grade B contour, hyphenation would expand a station's mandated cable carriage beyond its natural over-the-air service area.

<sup>10</sup> Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Century Communications Corp. v. F.C.C., 835 F.2d 292 (D.C. Cir. 1987), clarified 837 F.2d 517, cert. denied 486 U.S. 1032 (1988).

requirements, but no cable systems carried KRTW, thereby effectively foreclosing KRTW from access (via cable) to nearly half of the television households in the market.

Because of KRTW's proximity to Houston (less than twenty-five miles), non-network programming sold to Houston television stations is not available for purchase by KRTW, by virtue of the industry-standard and Commission-approved syndicated exclusivity arrangements.<sup>11</sup> Thus, KRTW must compete with Houston stations for access to non-network programming. In fact, because the cost of such programming is prohibitively expensive, KRTW has been operated since its inception primarily as a religious station, and most recently has entered into an affiliation agreement with ValueVision International for the carriage of its home shopping programming service.<sup>12</sup>

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<sup>11</sup> Section 73.658(m) permits a station to acquire exclusivity for non-network programming as against any station licensed to any community located less than 35 miles from its community of license.

Because of the proximity of the several communities of the Houston television market (see page 3, above), from a program supplier's standpoint, there is a "daisy chain" factor which effectively limits a program's sale to a single station in the greater Houston market. It is not surprising, therefore, that the stations licensed to the surrounding communities are either Spanish language stations (Galveston, Rosenberg, and Conroe) or affiliated with the Home Shopping Network (Alvin).

<sup>12</sup> An application for Commission consent to the assignment of KRTW's license to a subsidiary of ValueVision International was filed with the Commission on November 4, 1993.

As the Commission has recognized, the interrelationship of the 1992 Cable Act, the 1976 Copyright Act, and Section 76.51 of the Commission's Rules has placed at a considerable disadvantage, in terms of cable carriage, those stations licensed to communities within major television markets but not specifically listed at Section 76.51. This is particularly the case in a market such as Houston, where 50% of the television households are cable subscribers,<sup>13</sup> and thus, as a practical matter, are foreclosed from over-the-air signals. This handicap arises from the fact that, whereas the 1992 Cable Act nominally grants a station "must-carry" status throughout the ADI in which its licensed community is located, a station will continue to be deemed "distant" for copyright royalty purposes as to any cable system on which its carriage would not have been required by the Commission's Rules in effect on April 15, 1976, under Section 111(f) of the Copyright Revision Act of 1976 (17 U.S.C. Sec. 111).<sup>14</sup> Under those 1976 rules, a television station is entitled

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<sup>13</sup> November 1992 Nielsen data for the Houston ADI reports that there were 726,110 cable households, vs. total television households of 1,465,700 (Arbitron 1992-93 Estimate).

<sup>14</sup> The original purpose of collecting copyright royalty payments from cable systems for their carriage of "distant" signals was to compensate the program suppliers of such "distant" stations whose product was being exposed (and thus devalued) in "distant" markets where the program supplier presumably sought to market its product. As applied to cable carriage of KRTW in the Houston ADI, the collection of such royalties would amount to an undeserved windfall for program suppliers; as noted above, no programming of KRTW has or could duplicate that of the Houston stations, because of Section 73.658 of the Commission's rules, and the 35-mile zone of exclusivity permitted (and routinely contracted for).

to mandatory carriage (a) within a 35-mile zone centered on the reference point of its community of license, or, if that community is part of a hyphenated market designated in Section 76.51 of the Rules, within the 35-mile zone of each such hyphenated community, and (b) in those counties (or communities) where it is (or was in 1971) "significantly viewed."

Most cable systems located beyond the Baytown 35-mile zone have resisted carriage of the KRTW signal by invoking the "increased copyright liability" provision of Section 76.55(c)(2) of the Rules.<sup>15</sup> A significant number of such systems, representing a large percentage of Houston's cable television market, lie within the Houston 35 mile zone (but outside of Baytown's 35 mile zone). Among these are the systems operating in Tomball, Richmond, Rosenberg, Katy, Sugarland, The Meadows, and Stafford, as well as significant unincorporated areas of Harris, Fort Bend, and Brazoria Counties.

In the absence of the requested hyphenation, Station KRTW must either indemnify cable systems beyond the Baytown 35-mile zone for their increased copyright royalty liability, or be

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<sup>15</sup> Only one such entity -- Time Warner Cable -- timely informed KRTW of the estimated copyright liability for which it would need indemnification, as required by the Commission's Report and Order in MM Docket No. 92-259, at ¶114. However, that information was supplied only as to two communities: In its October 20, 1993 Petition For Special Relief (CSR-4138-A), Time Warner has claimed that four additional communities served by its system lie outside the Baytown 35-mile zone. Time Warner has yet to advise KRTW of the potential liability as to those communities; indeed, it has taken the position that it has no obligation to carry KRTW in any of the sixteen communities served by its system.

denied carriage. The cumulative cost of indemnification, while not determinable (due to the failure of virtually all such systems to estimate KRTW's potential indemnification liability), would surely be significant. Moreover, requiring KRTW to "buy" its way on to such systems through indemnification of their potential copyright liability would merely substitute one type of handicap (vis-a-vis Houston stations which are deemed "local" on those systems) for another. Competition is disserved when one station in a market is compelled to pay for access to cable viewers which its competitors receive without payment.

#### D. The Public Benefit

The overarching objectives of the 1992 Cable Act are to promote competition and consumer choice.<sup>16</sup> Surely, expanding the cable carriage opportunities to include all stations licensed to communities within the television market serves both of these goals. By contrast, treating as "distant" stations such as KRTW which are licensed to communities not specifically named in Section 76.51, but located within the immediate vicinity of such named communities, is both anti-competitive and irrational. Equating stations such as KRTW with "super-stations" such as WGN,

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<sup>16</sup> Another stated objective -- to ensure that cable services are reasonably priced, either through regulation or competitive market forces -- is not directly implicated in the definition of television markets.

WTBS, or WOR for copyright purposes<sup>17</sup> simply makes no economic sense, and relying on this faulty premise to deny KRTW cable carriage on local systems (many of which are located within its city grade contour) disserves cable subscribers and harms KRTW.

#### IV. Conclusion

In summary, KRTW has shown that it meets the four-part test which the Commission traditionally applies in evaluating proposed amendments to Section 76.51 of its Rules. Accordingly, the Commission is urged to recognize the realities of the Houston television market, and promptly to institute rulemaking to amend Section 76.51 of the Rules to include Baytown, Galveston, Alvin, Rosenberg, Katy, and Conroe with Houston on a hyphenated basis.

Respectfully submitted,

PRAY, INC.

By: 

Donald E. Ward  
1201 Pennsylvania Avenue, N.W.  
Fourth Floor  
Washington, D. C. 20004  
(202) 626-6290

Its Attorney

December 3, 1993

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<sup>17</sup> As noted above, the proximity of Baytown to Houston permits the Houston stations to purchase non-network programming with exclusivity provisions barring the sale of such programming to KRTW. Thus, carriage of KRTW on systems throughout the Houston ADI could not depreciate the value of any of its syndicated programming to the economic detriment of the copyright holder -- the underlying premise for the imposition of royalties upon cable systems for their carriage of "distant" signals.

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EXHIBIT E-1



# EXHIBIT B



